In the Supreme Court of the United States

OCTOBER TERM, 1970

CITIZENS TO PRESERVE OVERTON PARK, INC., WILLIAM DEUPREE, SR., AND SUNSHINE K. SNYDER, PETITIONER

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION AND CHARLES W. SPEIGHT, COMMISSIONER, TENNESSEE DEPARTMENT OF HIGHWAYS

ON APPLICATION FOR STAY PENDING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF TRANSPORTATION IN OPPOSITION

Petitioners seek, pending the filing and disposition of their petition for a writ of certiorari, to enjoin the Secretary of Transportation and the Commissioner of the Department of Public Highways of the State of Tennessee, from constructing a portion of an interstate highway passing through Overton Park, a 342-acre public park in Memphis, Tennessee. After memoranda in opposition were filed on behalf of the Secretary and the Tennessee Highway Commissioner

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respectively, this Court, by order of November 20, 1970, set the matter for oral argument on December 7, 1970.

1. The case concerns approval by the Secretary of Transportation, pursuant to 23 U.S.C. 138, of a portion of Interstate Route I–40 passing through Overton Park. The highway is being built as a cooperative federal-state venture under the Federal-Aid Highway Act, 23 U.S.C. 101, *et seq.*, which prescribes federal grants to the states of 90 per cent of highway costs to facilate "the prompt and early completion of the National System of Interstate and Defense Highways" (23 U.S.C. 101(b), 120(c)). Under the statute, the states "to the greatest extent possible" select the different routes, subject to the approval of the Secretary of Transportation (23 U.S.C. 103(d)), and submit "such surveys, plans, specifications, and estimates * * * as the Secretary may require," 23 U.S.C. 106(a). Moreover, the Act requires that a state highway department submitting plans for a route "involving the bypassing of, or going through, any city, town, or village * * * shall certify to the Secretary that it has had public hearings * * * and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community." 23 U.S.C. (Supp. V) 128(a).[1]

[1] Procedural requirements for those hearings are set out in Policy and Procedure Memorandum 20–8 of the Department of Transportation (23 C.F.R. 1, Appendix A).

In 1968, Congress amended the Federal-Aid Highway Act to add, *inter alia,* the following provision (82 Stat. 823, 23 U.S.C. (Supp. V) 138):

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

The effective date of this section was August 23, 1968 (82 Stat. 836).[2]

On December 2, 1969, petitioners brought suit in the United States District Court for the District of Columbia asserting that the Secretary had failed to comply with this provision and thus should be enjoined from releasing federal funds to the Tennessee Highway Department for the Overton Park project.[3] The action was transferred to the United States District Court for the Western District of Tennessee, where Commissioner Speight was added as a defendant, and on February 6, 1970, that court denied petitioners' motion for preliminary injunction and granted summary judgment to the respondents. A divided court of appeals affirmed and dissolved an injunction pending appeal which it had previously granted. It denied a petition for rehearing *en banc* and an application for stay.

2. For petitioners to succeed on the instant stay application, they must demonstrate that the issues to be presented in their proposed petition for a writ of certiorari are such as to warrant further review by this court. We submit that on this record no such showing can be made.

The determination that Interstate Route I–40 should pass through Overton Park was originally made by the

[2] This same provision is contained in the Department of Transportation Act, 49 U.S.C. 1653(f), and has been a part of that statute, in slightly amended form, since 1966 (80 Stat. 933).

[3] Petitioners also alleged procedural errors in the public hearings held by the Tennessee Highway Department, but those matters do not appear to be the object of the proposed petition.

Bureau of Public Roads[4] in 1956, more than eleven years before enactment of section 138; the decision was reaffirmed in 1966, 1968, and 1969. (Affidavit of Edgar H. Swick, Deputy Director of the Bureau of Public Roads, at pp. 1, 2). Swick attested (Swick Aff., p. 1) that "[a]ll alternate alignments were rejected because of large displacements of persons, hospitals, schools, churches, and commercial establishments." As he further explained (Swick Aff., pp. 1–2):

> For instance, the route immediately north of the park would have involved the taking of three schools, including Southwestern University and the largest high school in Memphis, plus churches attended by 4,000 people, industries, and the residences of more than 1,500 people. The route south of the park would have involved taking two schools, three churches attended by 7,500 people, 46 commercial establishments, residential units being occupied by over 3,000 persons and a hospital and home for the aged. Incidentally, the construction and right-of-way costs of the least expensive of these alternate routes would exceed the cost of the chosen route by many millions of dollars (*Ibid*).

In 1967, prior to passage of section 138, the Secretary authorized acquisition of the right-of-way on either side of the park, and most of that land has now been purchased and cleared. Virtually all of the 2,200 people living there have been displaced, and most of the buildings destroyed (Swick Aff., p. 3). Moreover, title to the affected park land—which amounts to 26 acres, or less than 8% of the total acreage—has already

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[4] At this time the Bureau of Public Roads was a part of the Department of Commerce. The Department of Transportation Act (49 U.S.C. (Supp. V) 1651 *et seq.*), which became effective on April 1, 1967, transferred the Bureau of Public Roads to the new Department of Transportation (49 U.S.C. (Supp. V) 1655).

been acquired by the State of Tennesee from the city of Memphis for $2,000,000. By local ordinance, the city was required to invest this sum in other park land; accordingly, it spent $1,000,000 to acquire a 160-acre golf course and expects to use the remainder to buy separate local park areas totalling 140 acres.[5]

The route chosen was designed to minimize damage to the park (Swick Aff., pp. 3–4). Thus, the highway is to follow the path of an existing bus road, presently 40 to 50 feet wide, widening it to from 250 to 450 feet, including a 40-foot wide landscaped median strip. The approved plan calls for the new roadway to be depressed below ground level so that traffic on the road will not be visible to users of the park; in one area, however, where the highway crosses a creek, it will not be depressed, since to do so would cause serious drainage problems.[6]

On November 5, 1969, the Secretary again approved the plans for the Overton Park highway as outlined above (see pp. 11–12, *infra*). A proposal that the interstate road be tunneled under the park was unacceptable because the cost would have been about $107,000,000, as compared to $3,500,000 for the depressed route; moreover, it presented difficulties of construction, drainage, concentrated air pollution at ventilation points, and traffic safety. Another proposal that the highway be built in a cut and covered at ground level was unsatisfac-

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[5] An additional $209,200 paid to the city by the state for construction of certain parking areas and the moving of a wooden pavilion and various utilities has been spent by the city to improve the park's zoo (Swick aff., pp. 5–6).

[6] A pedestrian crossway is planned at the zoo, and other such crossways are under study (Swick aff., pp. 4–5, 6).

tory for similar reasons; it would have cost approximately $41,500,000, and would not have preserved the original park vegetation (Swick aff., p. 3).

3. Petitioners assert on this application, as they did below, that (a) the Secretary's approval of the park route was erroneous because the Secretary failed to make specific written findings at the time he determined that "there is no feasible and prudent alternative" to the use of the park land for the highway and that the chosen route "includes all possible planning to minimize harm to [the] park", within the meaning of section 138; (b) the courts below erred in refusing to require the Secretary to testify concerning the actions he took pursuant to section 138, (c) the district court improperly considered only the evidence submitted by the Secretary in determining whether to uphold his determinations under section 138; and (d) it was error to grant summary judgment to the Secretary on the present record. None of these claims is deserving of review by this Court.

(a) It is undisputed that the Secretary, on the occasion of his 1969 approval of the Overton project, issued no written findings and wrote no opinion. However, there is nothing in the Federal-Aid Highway Act requiring him to have done so. In the absence of a Congressional mandate, such a requirement should not lightly be read into the statute. See *Sterling National Bank* v. *Camp,* No. 27,988, C.A. 5, decided August 27, 1970. It is instructive that the Administrative Procedure Act contains no such requirement. Indeed, grants-in-aid are

specifically excluded from that Act's rule-making requirements (5 U.S.C. (Supp. V) 553(a)(2)), and written findings and conclusions are called for only in "cases of adjudication required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. (Supp. V) 554(a)). The Federal-Aid Highway Act does not instruct the Secretary to hold a hearing before approving an interstate highway route;[7] nor, for that matter, can the Secretary's determination of the proper route and design for a highway reasonably be considered an "adjudication" within the meaning of 5 U.S.C. (Supp. V) 554(a). Cf. *South Suburban Safeway Lines, Inc.* v. *City of Chicago,* 416 F. 2d 535, 540 (C.A. 7).

Petitioners maintain that without written findings by the Secretary, judicial review of his determinations are "frustrated." Such an argument is based on a faulty premise; it overlooks the essential fact that the evidence on which the determinations rest—*i.e.*, the administrative record—is always open to scrutiny. Thus, where the Secretary's decision on a particular question is assailable as being in excess of discretion, dissatisfied persons have ample opportunity to ascertain that fact and present to the courts those portions of the administrative record substantiating their case. Such an opportunity was accorded petitioners in the instant case (see *infra,* p. 13), but, as both courts below held, they failed to introduce any evidence to support their claim; nor has there been any attempt

[7] The statute, rather, requires the state highway department to hold a hearing under the terms of 23 U.S.C. 128.

to set out in their present application evidence that might tend to indicate the Secretary abused his discretion. Petitioners' attempt to overturn the determination of the Secretary has been frustrated not by the absence of written findings but rather by the paucity of evidence in support of their contentions.

At all events, this question is not one that need be considered by this Court. The Department of Transportation has adopted a new procedure concerning determinations made under section 138; since January 31, 1970, such determinations have been incorporated in formal memoranda signed by the Secretary which explain the reasons for the action taken. As of June 30, 1970, these written determinations have been made by the Federal Highway Administrator, and then submitted to the Secretary for his evaluation and concurrence.

(b) Petitioners next ascribe as error the refusal of the courts below to permit petitioners to compel the Secretary to testify as to "what actions he took under section 138" (Application for Stay, p. 7). To the extent that petitioners were seeking by this means "to ascertain the bases, if any, for [the Secretary's] determinations" (*id.*, p. 6), *United States* v. *Morgan*, 313 U.S. 409, bars any such inquiry. In that case, the Secretary of Agriculture had been "questioned at length regarding the process by which he reached the conclusions of his order [under the Packers and Stockyards Act, 7 U.S.C. 181 et seq.] * * *." 313 U.S. at 422. This Court there held (*ibid*):

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> * * * [T]he short of the business is that the Secretary should never have been subjected to this examination. * * * We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny * * *, so the integrity of the administrative process must be equally respected. * * *

Petitioners rely extensively upon *D.C. Federation of Civic Associations, Inc.* v. *Volpe,* No. 2821–69, D.D.C., decided August 23, 1970, as presenting a conflict with the instant court of appeals' decision that should be reviewed by this Court. But there is no occasion for this Court to review the asserted conflict between the decision of the court of appeals on this point and the decision of the District Court for the District of Columbia. Rule 19(1)(b) of the Rules of this Court. Indeed, earlier in the *D. C. Federation* litigation, the Court of Appeals for the District of Columbia Circuit had refused to issue a writ of mandamus compelling the district judge to permit the taking of the Secretary's oral deposition, stating (slip. op. p. 2), "ordinarily a cabinet officer should not be subjected to oral deposition." *D. C. Federation of Civic Associations* v. *Sirica,* No. 24,216, C.A.D.C., decided May 8, 1970. Thus, the subsequent decision of the district court upon which petitioners rely here, compelling the Secretary's testimony at trial, did not even comport with the view of the D.C. Circuit as earlier expressed in the same litigation. And see *Braniff Airways, Inc.* v. *C.A.B.,* 379 F. 2d 453, 460–461 (C.A.D.C.).

In any event, the district court decision in that case is not in point, for in the peculiar circumstances there

presented (see slip. op. pp. 13–20), some doubt existed whether the Secretary had actually made the determinations required by section 138; the plaintiffs were thus permitted to compel Secretary Volpe to testify on that point. In contrast, we do not have here any suggestion that the Secretary acted in response to political pressures or in bad faith, as was the charge in the District of Columbia case; nor are we without the "contemporaneous written record" that was missing in *D.C. Federation*. The record in the present case contains a press release dated November 5, 1969, announcing the Secretary's approval of the route through Overton Park (Swick aff., exhibit C).[8] That release states specifically that the "plan for Overton Park is the most reasonable open to [the Department of Transportation]," pointing

[8] Petitioners' efforts below to show that the Secretary made no determination as to feasible and prudent alternatives centered primarily on the testimony before the Senate Subcommittee on Roads of Lowell L. Bridwell, the former Federal Highway Administrator, who approved the route in 1968. Bridwell there stated that he asked the Memphis City Council to consider the alternatives, urging them "to focus upon the conflicting set of community values that are inherent in this kind of situation." This testimony, rather than reflecting a delegation by the Secretary of his duty to the local authorities, indicates complete compliance with the statute. As noted below (Application for Stay Ex. B, p. 8–9), the legislative history of the statute makes it clear that local preferences are to be considered: "This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority." Conf. Comm. Rep. No. 1799, 90th Cong., 2d sess., p. 32.

out that "[t]he options of [the Secretary] were few, mainly because the route of the highway had previously been determined." Moreover, it is clear from the release that the Secretary conditioned his approval on modifications in the plan to minimize harm to the park, such as depressing the roadbed and building pedestrian crossings.[9] There is, then, no cause for this Court to review the decision below in light of the holding of the District Court for the District of Columbia in *D.C. Federation*, which was based on materially different circumstances.

(c) Petitioners' contention that the Secretary should have submitted to the district court the entire "administrative record" upon which he acted is equally without merit. In particular, petitioners take issue with the Secretary's failure to introduce "reports which the Tennessee Highway Department was required to file analyzing alternative routes and designs" (Application for Stay, p. 4). If this information had been otherwise unavailable to petitioners in these proceedings, so that the Secretary might be open to the charge of secreting material favorable to petitioners' cause, the argument might have some substance.[10] However, such is clearly not the case.

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[9] In *D.C. Federation*, *supra* (slip op. p. 25, n. 31), the district court had stressed that a press release issued by the Secretary in that case had not specifically mentioned his determinations under section 138. The court there—erroneously, in our view—rejected the government's contention that this should be inferred from the Secretary's overall approval of the bridge project. The court ultimately found that the Secretary had fully complied with section 138 (slip. op. pp. 28–36).

[10] This was precisely the charge made in *Garvey* v. *Freeman*, 397 F. 2d 600 (C.A. 10), noted in the margin of petitioners' application (Application for Stay, p. 8). See generally 6 Moore, Federal Practice, 2397 (2d ed. 1966).

The Department of Transportation advises us that in January, 1970, Mr. John W. Vardaman, counsel for the petitioners, asked, and was granted permission, to inspect the Department file on the routing of Interstate Route I–40 through Overton Park. He thereafter personally inspected the administrative record and was even asked if he wished to have copies made of any of the documents; he did not. Thus petitioners' counsel had full access to all the discoverable documentary material on which the determination to approve the route through Overton Park was based.[11] Nothing precluded petitioners from introducing all or part of the record in the district court to substantiate their claim. Having chosen not to do so, it is difficult to understand how petitioners can assert they have been harmed by the Secretary's failure to submit an "administrative reord".

(d) Finally, petitioners seek a stay in order to ask this Court to review for a third time the same evidence considered by both courts below, hoping that it

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[11] The reports of the Tennessee Highway Department, written pursuant to Policy Procedure Memorandum 20–8, paragraph 10.b(1) (23 C.F.R. 1, Appendix A), had been submitted to the Secretary in connection with the public hearings. Policy Procedure Memorandum 20–8, paragraph 10.b(1)–(4) (*ibid*). Moreover, these documents were also available for public examination at the office of the Bureau of Public Roads, Engineers Division, Nashville, Tennessee in accordance with 5 U.S.C. (Supp. V) 552(a)(2), and petitioners' counsel had been so apprised. Finally, copies of these same documents were on file for public inspection at the office of the State Regional Right-of-Way Engineer, State Office Building, Memphis, Tennessee, and notice to this effect had been published in the local newspaper pursuant to Policy Procedure Memorandum 20–8, paragraph 10.c (*ibid.*).

will find the determinations of the Secretary arbitrary and capricious (see 5 U.S.C. (Supp. V) 706(2)(A))[12] where the other courts did not. Such a review of evidence is not a proper basis for granting a petition for a writ of certiorari. In any event, the findings below—that petitioners' affidavits failed to raise any substantial question of fact—were entirely correct.

As we earlier indicated, Edgar H. Swick, in his affidavit submitted on behalf of the Secretary,[13] set forth with some specificity the difficult problems of displacement and dislocation inherent in the use of alternate routes (*supra*, pp. 5–6). These facts are undisputed by petitioners; significantly, they do not even suggest a possible alternate route. Nor do they dispute the fact that at the time Secretary Volpe made the determinations here in question, "the interstate route had been excavated up to either end of the park with the resulting disruption of homes and businesses that necessarily result whenever a major highway is routed through a city" (Application for Stay, Ex. B, p. 7).[14] Moreover, the park land to be affected had already been acquired by the State of Tennessee (see

[12] That this is the proper scope of judicial review of action by an administrative agency is not here contested. See *Western Addition Community Organization* v. *Weaver*, 294 F. Supp. 433, 437 (N.D. Calif.); *Board Review League, Town of Bedford* v. *Boyd*, 270 F. Supp. 650, 659–660 (S.D. N.Y.); *D.C. Federation of Civic Associations, Inc.* v. *Volpe*, *supra*, slip. op. pp. 7–8; and see 49 U.S.C. (Supp. V) 1655(h).

[13] The Secretary is authorized to act through delegates. 49 U.S.C. (Supp. V) 1657(e)(1).

[14] As pointed out below, "[e]ven assuming that the Secretary was not aware of this condition, the court could not ignore the social and economic impact of changing the route at this late date" (Application for Stay, Ex. B, p. 8).

upra, pp. 5–6). To conclude in these circumstances that here existed "no feasible and prudent alternative" o the Overton Park route is neither arbitrary nor apricious. Any other decision would, as the court elow properly noted, not only have resulted in "addi-ional disruption, but that [disruption] already caused would have been futile and wasteful." (Application for Stay, Ex. B, p. 7). Manifestly, this was neither he intent nor the purpose of Section 138. As explained n the Report of the Senate Committee on Public Works (S. Rep. No. 1340, 90th Cong., 2d sess., p. 19):

> The committee would further emphasize that while the areas sought to be protected by section 4(f) of the Department of Transportation Act and section 138 of title 23 are important, there are other high priority items which must also be weighed in the balance. The committee is extremely concerned that the highway program be carried out in such a manner as to reduce in all instances the harsh impact on people which results from the dislocation and displacement by reason of highway construction. Therefore, the use of park lands properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movement of large numbers of people.

The issue, then, turns in the final analysis on whether the approved plan included "all possible planning to minimize harm" to the Park, within the meaning of Section 138. On this point, petitioners have suggested two possible alternatives to the depressed highway design actually selected: a bored

tunnel and a cut and cover tunnel. Swick's affidavit demonstrates conclusively that both alternates were considered carefully before being rejected. While the marked difference in cost was one significant factor prompting the Secretary's rejection (*supra,* pp. 6–7), also relevant were the following considerations: park vegetation could not be preserved if a cut and cover tunnel was chosen; under either alternative, air pollution problems would be created at the tunnel vents; the underground roadways presented additional traffic hazards; and serious drainage and construction problems were presented by a creek running across the proposed right-of-way.

The affidavits introduced by petitioners do not dispute these findings, nor do they suggest other alternatives that might not have been considered by the Secretary. Rather, as observed below (Application for Stay, Ex. B, p. 10), they challenge only "the wisdom of the choice." Thus, on the basis of the record before them, the courts below could properly ascertain whether the Secretary's choice of the depressed highway design was arbitrary or capricious.[15]

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[15] In determining whether the proposed plan included "all possible planning to minimize harm" to the park, the court below properly held that the word "'possible' must be interpreted within the bounds of wisdom and reasonableness" (Application for Stay, Ex. B, p. 10).

Plainly, it was not for them to substitute their judgment for that of the administrative agency. As this Court held in *Berman* v. *Parker,* 348 U.S. 26, 35: "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area." And see *Nashville I–40 Steering Committee* v. *Ellington,* 387 F. 2d 179, 185 (C.A. 6), certiorari denied, 390 U.S. 921. This applies with equal force to the design of the highway. The question is whether the ultimate decision, viewed in the light of all competing factors, was arbitrary. Here, it clearly was not, and the courts below properly so found.

There is, then, no occasion for further review by this Court, and the stay application should be denied. While this may seem harsh in view of the short delay requested, petitioners have failed to give any reason for this Court to believe that a further delay will serve to prevent the construction of Interstate Route I-40 through Overton Park. In these circumstances, no purpose can be served by granting the relief here requested.

The application for a stay should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

No. 1066

Application for stay granted by Court on December 7, 1970 treated as petition for writ of certiorari.

Opposition to stay treated as opposition to petition for certiorari.